SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 121

PAUL H. BARNES,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, EX REL. EMMA K. BARNES.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

Are as set forth in the accompanying Petition, pages 1 and 2 thereof.

Jurisdiction.

The Judgment, to wit: the aforesaid Order of the Supreme Court of Pennsylvania, now sought to be reviewed, was entered on March 26, 1943 (R. 120-121).

The Jurisdiction of this Court is invoked under the Judicial Code of the United States, Sec. 237 (b), as amended by the Act of February 13, 1925.

Statement.

A summary statement of the case is set forth in the accompanying Petition, pages 2-4, thereof.

Your Petitioner, since the reduction of the said Order to $15 per week by Rhodes, Jr. of the Superior Court of Pennsylvania, June 24, 1940, has been paying same in accordance therewith from the date of said Order by Piekarski, Jr., of the Municipal Court of Philadelphia, to wit, August 30, 1939, but because of your Petitioner's advanced age (now in his 72nd year) (R. 10), failing health, poorness of business, inability to maintain appropriate income from his investments, he finds himself unable to pay the said Order of $15 per week out of his combined business and personal investment income, but must take it from—and thus eat up—his principal (his capital).

A summary statement of the Argument is set forth in the Index, and as "Questions Presented" in the accompanying Petition, page 2 hereof.

Specification of Assignment of Error.

The failure of the Supreme Court of Pennsylvania to grant the review of the decisions of the Superior Court of Pennsylvania, as requested by your Petitioner, constituted an Affirmance of said decisions of the said Superior Court, and, in turn, constituted an Affirmance of the decision of the Municipal Court of Philadelphia, all of which is Error, with particular reference to the rights, immunities and privileges of your Petitioner *as a citizen of the United States* in respect to:

1. The Courts below erred, and discriminated against your Petitioner, *in not impartially applying an established, well-known principle of Pennsylvania law* as laid down in this class of cases, to wit, that a wife's separate income or earnings shall be taken into consideration in making a sup-

port order upon a husband, thus denying your Petitioner the equal protection of the laws, as guaranteed to him by the Constitution of Pennsylvania, Article 1, Sec. 1, Sec. 9 and Sec. 11, and as guaranteed to your Petitioner, as a citizen of the United States by Article VI, Par. 2, of the Constitution of the United States as it is enforced by Article XIV, Sec. 1, of the Amendments to the Constitution of the United States.

2. The Courts erred in their decisions when they, by misapprehension of the testimony, averred that your Petitioner's Wife's separate income was less in the accounting period of "Exhibit A" (R. 6A-6M) September 1, 1940 to August 31, 1941, now before this Court, than it was in the accounting period for the Order of August 30, 1939, which latter testimony is contained in the Record of the prior proceedings between these parties before the Superior Court of Pennsylvania, as of No. 24 October Term, 1940; (see Record thereof, pages 160a, 161a and 162a, as set out in "Appendix D" attached hereto and made part hereof. As a result of which misapprehension, the Courts below abused their discretionary power in an arbitrary and groundless manner, contrary to your Petitioner's rights, immunities, and privileges guaranteed to him as a citizen of Pennsylvania by its Constitution, Article 1, Sec. 1, Sec. 9, and Sec. 11, and as a citizen of the United States by Article VI, Par. 2, of the Constitution of the United States, and Article XIV, Sec. 1 of the Amendments to the Constitution of the United States, and, further, constituted a deprivation of your Petitioner's rights and property "without due process of law", as guaranteed to him by Article V and Article XIV, Sec. 1 of the Amendments to the Constitution of the United States.

3. The Courts below erred in their decisions denying your Petitioner reasonable deductions—as set out in his

accounting, "Exhibit A" (R. 6H, 6J, 6K) for services of Counsel in advising him, and in preparing and representing him in this case—a Criminal Prosecution—contrary to his rights and privileges guaranteed to him by the Constitution of Pennsylvania, Article 1, Sec. 1, Sec. 9 and Sec. 11, and by Article VI of the Amendments to the Constitution of the United States, as it is enforced by Article XIV, Sec. 1, of the Amendments to the Constitution of the United States.

Argument.

Point I.

Question 1—Did the Courts below err in denying your Petitioner's Petition for Vacation or Substantial Reduction of Order of Support against him, and in so doing deny him "Due Process of Law":

(a)—In denying your Petitioner "the equal protection of the laws?

In *Martocello* v. *Martocello* (*supra*) (1942), Judge Stadfeld of the Superior Court of Pennsylvania recognized the well established and well-known principle of law in cases of this kind, to wit: that in making an order for support of a wife, against her husband, whether it be the first order or be a reconsideration of an existing order on "Petition to Vacate or Substantially reduce" such Order, the wife's separate income or earnings shall be taken into consideration in fixing the amount of the Order, and he reversed the Municipal Court of Philadelphia for not so taking the separate income, or earnings, of the wife into consideration. That was a case essentially similar to the instant case, except there was a child there but that did not affect the case as the Father provided satisfactorily for the child, yet in the instant case, while Rhodes, J. in his Opinion of January 28, 1943 acknowledges this principle as set out in the

Martocello case, still he absolutely fails to take into consideration the substantial income of your Petitioner's said wife of $1151.78 from her Father's Estate (R. 51, 60) plus $67.50 from stocks, or $1219.28 from which she claimed a non-recurring item (foreclosure in her Father's estate) of $262.39, and the sum of $151.14, also, as deductions, thus reducing her income to $805.75, saying she did receive said $151.14 a few days before Sept. 1, 1940,—the date of the beginning of the "Exhibit A" (R. 6A-6M) accounting period, but as the Statement (Petitioner's Exhibit 4) (R. 60) shows it paid to her September 3, 1940, your Petitioner included it in her income before the Superior Court, alleging her income $956.89 (agreeing to waive her non-recurring item if she would waive your Petitioner's non-recurring items, which she would not do), so your Petitioner now claims her income for the accounting period should be what she took in, to wit. $1219.28, but still willing if he is allowed non-recurring items to permit her the same allowance.

There is no computation of figures, no rule or standard of measurement, in the said Opinion of Rhodes, J. of January 28, 1943 (R. 93, 96), showing along with the income figures of your Petitioner that Judge Rhodes did actually take into consideration the wife's said substantial income, wherefore your Petitioner avers that he was discriminated against by both Judge Piekarski, who entirely ignored in his Opinion of September 15, 1942, Petitioner's said Wife's income, and by Judge Rhodes, in this respect, and that they refused to give your Petitioner the benefit of the said principle laid down in *Martocello* v. *Martocello* (*supra*), although your Petitioner's facts are so similar to the facts in that case that if said Judges had given your Petitioner the "equal protection of the laws" they would necessarily have had to treat him the same as Judge Stadfeld treated Appellant Martocello,—the husband, and in not having

given your Petitioner the benefit of this principle of law, said Judges and Courts, and the Supreme Court of Pennsylvania by its affirmance of their decisions, also, have denied to your Petitioner the "equal protection of the laws" and his Constitutional rights under both the Constitution of Pennsylvania, Article 1, Sec. 1, Sec. 9, Sec. 11, and the Constitution of the United States, Article VI, Par. 2, as it is enforced by Article XIV, Sec. 1, of the Amendments to the Constitution of the United States.

And, there is another established, well-known principle of law in this class of cases in Pennsylvania, as stated by Keller, President Judge, of said Superior Court of Pennsylvania, in the case of Fort *v.* Fort, 124 Pa. Superior Ct., 151, 153 (1936), against an Order of support being so excessive that it depletes the principal (capital) of the husband, and in that case where the husband had squandered and wasted his principal, it was held that did not warrant the lower court (Municipal Court of Philadelphia), by way of reprisal, to make an order that necessitated further depletion of the principal, and, perhaps, its total exhaustion.

In the instant case, although Petitioner's accounting, "Exhibit A" (R. 6A-6M) showed he was compelled to use $402.00 of his principal to live,—during the accounting period,—besides incurring a principal (capital) liability of $511.23 for unpaid taxes on his Philadelphia properties during said accounting period, and if he had used all his $448.89 net income, as the explanation of his accounting—"Exhibit A"—(R. 112, 111) and Appendix—C, hereto, show, he would have still owed $62.32 on account thereof, so taking the $402. principal he used, the $62.32 necessary to complete paying said taxes, and add to that the $780. he paid his wife on the $15. per week Order, your Petitioner depleted his principal that accounting period between $1200. and $1300., so, again, the Courts below erred

and denied your Petitioner "the equal protection of the laws, when they did not likewise apply to him this principle "against depletion of the husband's principal" as laid down and applied by Keller, P. J. in this Fort *v.* Fort case, and thus again denied your Petitioner "Due Process of Law" so guaranteed to him by the Constitutions of Pennsylvania and of the United States, as aforesaid.

And although your Petitioner brought forcefully to the attention of the said Superior Court in his Petition for Re-Argument (R. 102 (7), 103 (8) this denial to him of his right to the equal protection of the laws and to due process of law (citing authorities for laying down rules of just measurement for both the husband and wife when the wife had a separate income or earnings,) and also later brought this matter forcefully to the attention of the Supreme Court of Pennsylvania in your Petitioner's Petition to them to review the decisions of the Courts below (R. 114 Question C), and therein also brought forcefully to their attention the principle of the Fort *v.* Fort case against depletion of the husband's estate by the burden of the Order (R. 111), yet in both instances your Petitioner's efforts for consideration and redress were ignored.

WHEREFORE, your Petitioner avers that the Courts below have grievously erred by their failure and refusal to impartially apply their laws equally to their citizens of Pennsylvania and to the citizens of the United States who are effected thereby as well as your Petitioner, and have grievously abused their discretionary powers to such a degree that such abuse has amounted to an actual, unreasonable, capricious, arbitrary, unlawful, inequitable discrimination against your Petitioner, contrary to his rights, privileges and immunities guaranteed to him by the Constitution of Pennsylvania and by the Constitution of the United States, who has thereby been placed in such jeopardy that he is

now compelled to come to this Court of highest resort humbly seeking protection for these, his sacred and guaranteed rights. See:

> Commonwealth of Pennsylvania *v.* Herman Petrillo, 338 Pa. 65, 98 (1940), 12 A. 2d. 317, 333, where Justice Maxey said:
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> "Both the 9th Section of the Bill of Rights" (Article 1) "of the Constitution of this Commonwealth and the 1st Section of the XIV Amendment to the Constitution of the United States guaranteed in substance to one accused of crime *not only the forms but also the fundamentals of a fair trial.*"

Which principle was confirmed by the said Justice Maxey of the Supreme Court of Pennsylvania in the still more recent case of Commonwealth of Pennsylvania *v.* Petrillo, 19 A. 2d, 288, 299; 341 Pa. 209, at 233 (1941).

Also, the leading and recent case of Smith *v.* O'Grady, 312 U. S. 329, 85 L. Ed. 859 (1941) where the Supreme Court of Nebraska (as did the Supreme Court of Pennsylvania in the instant case) dismissed Smith's Petition for Review, without Opinion, thus affirming the lower (State) Court, Justice Black, of the Supreme Court of the United States, in his Opinion said, *inter alia:*

> "That the Constitution" (of the United States) is the Supreme Law of the Land, and upon the State Courts, equally with the Courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution."

Your Petitioner in the instant case is a man convicted of a misdemeanor in a criminal prosecution and has his liberty only because of his recognizance, so his position is analogous to that of Smith *(supra),* and in that case your Honorable Court allowed Smith's petition for writ of certiorari to the Supreme Court of Nebraska, and, at the Argument

before your Honorable Court, reversed the Supreme Court of Nebraska as having denied to Smith the "due process of law" guaranteed to him by the Constitution of the United States.

POINT II.

Question I—Did the Courts below err in denying your Petitioner's Petition for Vacation or Substantial Reduction of Order of Support against him, and in so doing deny him "Due Process of Law":

> (b) In basing their decision on non-existing facts and, by thus abusing their discretion, deny your Petitioner "Due Process of Law".

While Judge Rhodes states in his Opinion of January 28, 1943, in the instant case (R. 93, 96):

> "Matters of this kind are largely within the discretion of the Court below and we do not interfere unless abuse of discretion appears."

Your Petitioner does not concede that such discretion applies to the instant case where Constitutional Rights are involved. See Case of Commonwealth of Pennsylvania *v.* O'Keefe, 298 Pa. 169 (1929) where Justice Walling said:

> "It has been authoritatively stated that the right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion. 6 R. C. L. 443."

This case was cited with approval and followed by Justice Sutherland in the leading case of Powell *v.* Alabama, 287 U. S. 45, 77, L. Ed. 158 (1932).

In the instant case, however, a reference to the testimony of November 25, 1941 (R. 9, 47) and March 27, 1942 (R. 61, 64) before Judge Piekarski, brought out the fact that the Petitioner's net income ("Exhibit A"—R. 6M) amounted

to $821.03 in his Personal Account Income, and (R. 6F) $332.69 in his Business Account Income, or a total of $1153.72 (R. 6A) (Recapitulation of "Exhibit A") from which, with the deductions shown thereon, your Petitioner's net income came down to the $478.76, but at the Argument before the Superior Court, November 12, 1942, a further non-recurring item of $29.87 received during said accounting period by your Petitioner as a Co-Executor's Commissions to your Petitioner as a Co-Executor with The Pennsylvania Company for Insurances on Lives and Granting Annuities, of the Mildred E. M. King Estate, were claimed as a further deduction by your Petitioner, which further reduced your Petitioner's said net income from $478.76 to $448.89 (R. 111-112, paragraphs (4) (5)). And, as shown above, if he had paid his taxes for the accounting period, with the $780 to his wife, etc., his capital would lose $1200 plus. While the Respondent's net income amounts to $956.89 if we allow her claimed non-recurring (foreclosure) item of $262.39,—and, including the sum of $780 received by her from your Petitioner on said Court Order, making a total income to her, other than said non-recurring item, of $1736.89.

As stated above in Point I, hereof, Judge Piekarski entirely ignored the Respondent's very substantial income, and Judge Rhodes just brushed it aside with the "offhand" statement (R. 96) in his Opinion of January 28, 1943:

> "the income which appellant's wife receives from her separate estate is now less than when the present order of $15 per week was entered."

This statement that your Petitioner's wife's income from her separate estate is now less than when said order was made, which would be August 30, 1939, is an utter misapprehension as is seen by a reference to the prior proceedings between these parties in the Municipal Court of Phila-

delphia in 1939, followed by your Petitioner's appeal to said Superior Court, as of No. 24, October Term, 1940 (Record of said proceedings pages 160a, 161a and 162a as set forth in Appendix-D attached hereto and made a part hereof), for there when Mrs. Barnes, Respondent, was examined as to her income for the year 1939, after stating two small payments received by her in the interest periods of March and June 1939, she was asked how much she expected to get for the interest periods of September and December 1939, and her Counsel objected to her testifying, whereupon she was asked if she expected to get as much as she did in 1938 (she having previously testified that she received $934—the largest income she had had for several years,—in 1938) and, over objection of her Counsel, she replied "I do not expect, I hope". So your Honorable Court sees plainly that there was no definite testimony as to what Respondent's income was for the accounting period which was the basis of the Order of August 30, 1939, so,—with no basis of fact upon which to make such a statement, your Petitioner contends that Judge Rhodes in his above quoted decisive statement had nothing upon which to exercise his discretion and, therefore, abused his discretion, and his Order retaining upon your Petitioner said $15 per week Order is against your Petitioner's rights to have the *fundamentals* as well as the *forms* of a *fair trial* in asserting the right of modification of the Order against him, a convicted man, in a Criminal Proceeding, as well as violating his rights, otherwise, of "Due Process of Law" and that he shall not be deprived of his property,—these weekly payments,—without "due process of law", as guaranteed to him by the Constitution of Pennsylvania and the Constitution of the United States, and enunciated by Justice Maxey of the Supreme Court of Pennsylvania, and by Justice Black in the hereinabove cited cases (Article VI, Par. 2, of the Constitution of the United States, and Article V and

Article XIV, Section 1, of the Amendments to the Constitution of the United States; and Article 1, Sec. 1, Sec. 9 and Sec. 11 of the Constitution of Pennsylvania.)

WHEREFORE, your Petitioner, believing his rights as a citizen of the United States as well as a citizen of the State of Pennsylvania, have been greatly abused by the Courts below denying them to him, as above set forth, now comes to this Court as a Supplicant, "with the Constitution of his Country in his hands," humbly seeking redress guaranteed to him by its sacred clauses, as stated by Justice Walling in the Supreme Court of Pennsylvania in Commonwealth of Pennsylvania *v.* O'Keefe, 298 Pa. 169 (1929), cited with approval by Justice Sutherland in Powell *v.* Alabama *(supra):*

> "It has been authoritatively stated that the right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion: 6 R. C. L. 443. As was said by Mr. Justice Coulter in Brown *v.* Hummel, 6 Pa. 87, 97:
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> " 'When the humblest citizen comes into this Court with the Constitution of his Country in his hands, we dare not disregard the appeal."

And your Petitioner begs this Court to accept this Petition and to permit him to argue this, his case, before your Honorable Court,—a case that involves in its principles, not only the rights of your Petitioner, but the sacred rights of thousands upon thousands of citizens of the United States, who, throughout the length and breadth of the land, are suffering injustices of this kind, and who, for the greater part, are unable by reason of distance, capital expense, and their inability to take time from their employments, to come to this Court and seek the redress they are entitled to under such provocation and denial of their civil rights which this Constitution, as the foundation of our Democratic form

of Government and the Supreme Law of the Land guarantees unto them.

Point III.

Question II—Did the Courts below err when they, in effect, refused your Petitioner the "Assistance of Counsel" in this a Criminal Case?

The courts below erred in refusing to allow your Petitioner the right to make reasonable deductions in his accounting ("Exhibit A") (R. 6H, 6J, 6K) for "legal services", "Counsel fees and expenses" in the course of this proceeding (See Opinion of Judge Rhodes, of January 28, 1943 (R. 94).

It is submitted that the instant case, namely, the prosecution of a husband for the support of a wife, is a *criminal proceeding,* and the crime a misdemanor; that a man's failure to support a wife carries with it arrest and imprisonment, and on conviction carries with imprisonment or fine, or both (Pennsylvania Penal Code of June 24, 1939; P. L. 872, "Wilful separation or non-support," Sec. 731; Purden's Penna, Stats. Annotated, Permanent Ed., Title 18. "Crimes and Offenses", Section 4731; also see "Desertion and Non-Support", said Penal Code of 1939, Sec. 733; Purden's said Penna. Statutes, Sec. 4733) and, therefore, it comes within the meaning of Article VI, Par. 2, of the Constitution of the United States, and Article V and Article VI of the Amendments to the Constitution of the United States, as enforced by Article XIV, Sec. 1, of the Amendments to the Constitution of the United States, wherein it is guaranteed that no person shall be deprived of life, liberty or property without due process of law, or the equal protection of the laws, and *that a person accused of crime "shall enjoy the right to" * * * "have the Assistance of Counsel for his defence.*

It is further submitted that Section 731 of the aforementioned Penal Code of Pennsylvania (1939) *give the right to the husband (your Petitioner) to show cause, whereupon such Order against him "shall be subject to modification by the Court," which proceeding is one in defence of his rights and property in the said Criminal Prosecution against him.*

And such "Assistance of Counsel" aforesaid necessarily carries with it, says Justice Sutherland in *Powel* v. *Alabama* (*supra*), (1932):

> "A fair opportunity to secure counsel of his own choice."

which is just what your Petitioner did in the instant case, and your Petitioner not coming within the classification of a "pauper," had no other recourse than to pay the reasonable fees of his counsel and the necessary legal expenses of this, his lawful proceeding, in the instant case (the reasonableness of which fees and expenses has never been questioned in these proceedings), which the Court below, by the Opinion of Judge Piekarski, of the Municipal Court of Philadephia (R. 89-90) and of Judge Rhodes of January 28, 1943, in the Superior Court of Pennsylvania (R. 93-94), in effect, basing their decisions on the erroneous conception that because your petitioner had failed to obtain a divorce from his said wife, in a previous divorce action of years before (*Barnes* v. *Barnes,* 116 Pa. Superior Ct. 92 (1935), your Petitioner had no right to the "Assistance of Counsel", contrary to your Petitioner's right thereto, guaranteed to your Petitioner in said Article VI of the Amendments to the Constitution of the United States—in asserting this, your Petitioner's lawful right to show cause for modification of the said Order of Support standing against your Petitioner in the said Municipal Court of Philadelphia.

Your Petitioner, in support of his contention that he has been grievously injured by this denial of his right of Coun-

sel and necessary legal expenses in his lawful petition in the courts below for "vacation or a substantial reduction" of said Order of Support against him, submits the premise that had he not been denied this right and had the reasonable amounts deducted by him for the employment of counsel and for legal expenses been properly considered and allowed to your Petitioner by the Courts below, the said Order would have been reduced.

Your Petitioner further avers that because of the said Courts below failing to allow such proper counsel fees and legal expense deductions, along with other deductions claimed by him, he has been forced to consume, because of the meagerness of his net income and earnings (See "Exhibit A" R. 6A, 6B),—some of his principal (capital) and also to, at the same time, incur capitale indebtedness for taxes on his properties in Philadelphia (R. 110 (3) 111 (4) and 111 and 112 (5)) which is contrary to the well established principle of Pennsylvania law as is laid down in such cases (*Fort* v. *Fort* (supra)).

Conclusion.

Wherefore, your Petitioner prays your Honorable Court, because of the gross and grievous injustice done unto him by the said Courts below, (the State Courts of Pennsylvania, by their arbitrary, unreasonable, and unConstitutional misuse of their powers and discretions,—as hereinabove set forth), to hear this, his Petition, and to make such ruling and decision as will afford unto your Petitioner the aid sought, in such a way as to bring to him the immediate vacation or substantial reduction of the said Order, which your Petitioner believes and contends may be legally and equitably done by your Honorable Court, and, in making such ruling and decision to point out the proper contitutional ways for the Domestic Relations Courts of this

Country (particularly in Pennsylvania) to make their Orders on Husbands for the support of their wives so that injustices such as in the instant case may not continue to be perpetrated in a manner contrary to the Constitutions, laws and decisions of their States, and the Constitution of the United States, as has been done in the instant case.

Respectfully submitted,

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